1979

Intermountain Smelting Corp. and State Insurance Fund v. Industrial Commission of Utah et al : Brief of Plaintiffs

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

INTERMOUNTAIN SMELTING CORP., and STATE INSURANCE FUND,

Plaintiffs on Appeal,

vs. : Supreme Court No. 16530

INDUSTRIAL COMMISSION OF UTAH, ANTHONY CAPITANO, and SPECIAL FUND OF Section 35-1-69 Utah Code Ann.,

Defendants on Appeal.

BRIEF OF PLAINTIFFS ON APPEAL, STATE INSURANCE FUND AND INTERMOUNTAIN SMELTING

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

AUTHORITIES CITED

NATURE OF THE CASE

This case is a Workmen's Compensation case concerning the interpretation of Utah Code Ann., 1953 Section 35-1-69. The major issues to be determined concern the apportionment of benefits in a situation where an employee has a pre-existing loss of bodily function disability and then suffers a work related injury resulting in addition loss of bodily function.

DISPOSITION BY THE INDUSTRIAL COMMISSION

The Industrial Commission of Utah has made the legal determination that Section 35-1-69 of the Utah Code Ann. does not allow for an apportionment of medical expenses and temporary total disability compensation between a pre-existing permanent loss of bodily function and a work related loss of bodily function. A Petition for Writ of Review and a Writ of Review brings this matter before the Court.

RELIEF SOUGHT ON APPEAL

Plaintiffs on appeal respectfully ask the decision of the Industrial Commission denying apportionment between the Second Injury Fund and the employer per Section 35-1-69 of the Utah Code Ann. be reversed by this Court.

FACTS

Anthony Capitano, the applicant before the Industrial Commission, was employed by Intermountain Smelting Corporation on June 9, 1976, when he stepped on a board that gave way causing him to fall approximately eleven feet to the ground. As a result Mr. Capitano suffered a crushing injury to his right ankle. (Record 43 and 158) As a result of that injury Mr. Capitano received temporary total compensation benefits from June 9, 1976, to February

14, 1977, and medical compensation benefits for the care and treatment of his injury. (Record 35)

The applicant simultaneously filed a claim pertaining to an accidental poisoning by lead or antimony or their compounds suffered while employed at Intermountain Smelting Corporation which occurred during the first ten days of December, 1975. Nothing regarding that incident is relevant to this appeal and therefore, it will not be discussed. (Record 158)

The applicant had previously sustained a gunshot wound to his left leg or ankle while in the service in Korea and in connection with this injury he received a 30% disability rating by the Veterans Administration. He receives a monthly benefit of approximately $113 which will continue during the remainder of his life. (Record 35, 38, 54, 158) The Medical Panel appointed by the Industrial Commission found that the applicant had sustained a 30% loss of use of his right foot as a result of the industrial injury of June 9, 1976. The Panel also found that the applicant had a 30% loss of use of his left foot due to the war injury. The Panel stated that the applicant had experienced increasing symptoms of the left ankle that were definitely related to the injury of his right ankle due to the changes in the weight bearing tendencies as a result of the combined injuries. The Medical Panel further found that the combined overall effects of both of the injuries gave the applicant a total loss of bodily function of the whole man of 25%. The Medical Panel could not further break down the relationship of the total 25% as to which ankle had contributed how much to the total loss of bodily function. (Record 150 151)

With that information the Administrative Law Judge, as concurred in by the Commission, made a determination in a very well thought out opinion that using the American Medical Association's Guides to the Evaluation of Permanent Impairment, an 8 1/2% loss of the whole man could be attributed to the industrial injury. Further, he found that the remaining 16 1/2% loss to the whole man could be attributed to the preexisting condition. A finding was also made that the 16 1/2% was a substantially greater loss than the applicant would have incurred if he had not had the pre-existing injury. The Commission went on to state as a finding that that circumstance qualifies the applicant for additional benefits payable out of the Special Fund under the provisions set forth in Section 35169 Utah Code Ann. (Record 159 160) With that assessment, plaintiff on appeal fully concurs.

The error claimed by plaintiff on appeal is the failure of the Administrative Law Judge and the Industrial Commission of Utah to accord to the employer and its insurance carrier the right of having the Second Injury Fund reimburse them from the Second Injury or Special Fund a proportionate share of the medical compensation benefits and the temporary total loss of bodily function benefits. There is no issue concerning permanent partial disability benefits.

ARGUMENT

PLAINTIFFS ON APPEAL ARE ONLY LIABLE FOR THAT PERCENTAGE OF THE TEMPORARY TOTAL DISABILITY COMPENSATION AND MEDICAL EXPENSES COMPENSATION AS THE PERCENTAGE OF PERMANENT PARTIAL DISABILITY FROM THE INDUSTRIAL ACCIDENT BEARS TO THE TOTAL PERMANENT PARTIAL

DISABILITY FROM ALL CAUSES.

This appeal is based upon the law as stated in Section 35-1-69 of the Utah Code Ann., 1953, as amended. For the Court's information and as it may recall there are several consolidated cases dealing with the same issues as presented in this appeal. The Court may wish to refer to Supreme Court Nos. 15882, 15881, and 15796. Oral argument has been presented in those above three cases and the Court currently has those matters under consideration.

For the convenience of the Court the pertinent parts of Section 35-1-69 of the Utah Code Ann. are set out below.

> (1) If any employee who has previously incurred a permanent incapacity by accidental injury, disease, or congenital causes, sustains an industrial injury for which compensation and medical care is provided by this title that results in a permanent incapacity which is substantially greater than he would have insurred if he had not had the pre-existing incapacity, compensation and medical care, which medical care and other related items are outlined in Section 35-1-81, shall be awarded on the basis of the combined injuries, but the liability of the employer for such compensation and medical care shall be for the industrial injury only and the remainder shall be paid out of the special fund . . . (emphasis ours)

Next, the statute describes the duties of a Medical Panel which is followed by an expression of the duty of the Industrial Commission:

> The Industrial Commission shall then assess a liability for compensation and medical care to the employer on the basis of the percentage of permanent physical impairment attributable to the industrial injury only, and the remainder shall be payable out of said Special Fund. Amounts, if any, which have been paid by the employer in excess of the portion attributable to the said industrial injury, shall be reimbursed to the employer out of said Special Fund.

The Commission through its Administrative Law Judge states that it was not the intent of the legislature to entitle an injured workman a double recovery for a pre-existing condition that otherwise would meet the criteria for payment from the Special Fund. In the case at bar the injured workman was receiving disability comepnsation from the Federal Government for what amounted to an 8 1/2% loss of the whole man, leaving 8 1/2% to be compensated by the employer and his insurance carrier and yet another 8% uncompensated if not by the Special Fund.

Arguendo, by Section 35-1-69 the applicant may or may not be entitled to the total 16 1/2% loss of the whole man attributable to the service connected injury. Nonetheless, even if the employee himself is not entitled to benefits from the Second Injury Fund, the employer's and its insurance carrier's "liability . . . for such compensation and medical care shall be for the industrial injury only . . ." Section 35-1-69, supra. In other words, even if the employee has received prior compensation from some other source, the employer cannot be made to pay any more than the damage actually caused by the compensible on-the-job injury. Stated still another way, it is clear from the wording of Section 35169, supra, that it is intended not only as a benefit to the employee, but also as a limitation of the extent of liability of an employer. As such, the fact of prior compensation from another source should not be visited upon the employer to increase his liability. That would be contrary to the clear policy that "the liability of the employer for such compensation and

medical care shall be for the industrial injury only . . ." Section 35-1-69, supra.

The apportionment of liability as herein requested is not without precedent. The case of Intermountain Health Care, Inc., v. Ortega, 562 P.2d 617 (1977) is the most recent interpretation of Section 35-1-69, supra. Therein, the applicant suffered from a pre-existing psychological condition relating to pain in her back. A back strain at work resulted in a medical determination that she had a 30% permanent partial disability with 10 % of that pre-existing and 20% due to the on-the-job incident.

In reversing the Industrial Commission for its failure to apportion the compensation payable (including permanent partial disability and temporary total disability) and the medical expenses, the Court stated the following:

> The position of the defendant as reflected in the Commission's order seems to be predicated on the assumption that because the pre-existing condition was quiescent and did not require medical treatment until the accident, the plaintiff employer should be held responsible for the entire expense thereof. But it will be noted that the statute makes no distinction between the award for compensation and medical expenses; and that if the requirement of the statute is met, that is, if the resulting permanent incapacity is substantially greater than if the pre-existing incapacity had not existed, the proportional causation must be found and that portion attributable to the previous condition paid out of the Special Fund. (citations omitted) (Emphasis added) at 562 P.2d 619.

The Court continues to explain what is meant by a "permanent incapacity . . . substantially greater than if the pre-existing incapacity had not existed . . ."

> The requirement that the pre-existing condition combines with the later injury to cause a "substantially greater" permanent incapacity does not mean that the former must be greater than the latter. It simply means that it be some definite and measurable portion of the causation of the disability. It surely cannot be doubted that 30% is substantially greater than 20%, nor that 10% disability is itself substantial in that it is definite and measurable. Consequently, in as much as it appears that the pre-existing condition increased the resulting disability by one/third, it follows that under the requirments of the statute, the medical expenses as well as the compensation award should have been apportioned two/thirds from the employer and one/third from the Special Fund. (Emphasis added)

One more time the Industrial Commission, in its Denial of Motion for Review (R. 171), appears in essence to be saying that the Court didn't mean what it said in the Ortega case, supra. The Commission goes beyond the four squares of this Court's opinion and facts upon which that opinion is based and implies that the Court was ill-informed on the totality of the evidence. The Commission seems to be attempting to retry Ortega, supra., because it does not care for the clear pronouncement of law contained therein and in Section 35-1-69, supra, because of its concern about its administration of the Special Fund.

The Commission would further want this Court to limit the application of the Ortega rule by excluding temporary total and medical benefits. Both the Ortega decision and Section 35-1-69 state that compensation and medical care are to be apportioned. That "compensation" includes temporary total and medical benefits is put to rest by the definition of "compensation" in the Act itself.

". . . The following terms as used in this title shall be construed as follows:

* * * * *

(6) "Compensation" shall mean the payments and benefits provided for in this title."

Section 35-1-44(6) UCA, 1953.

In all of this discussion, we should not forget the basic purpose of Second Injury Funds. Professor Arthur Larson in his learned treatise very aptly states the public policy which dictated the passage of such legislation:

> While at first glance it mgiht appear that the apportionment rule favors the employer and nonapportionment the employee, in practice the nonapportionment rule proved the worse of the two evils from the standpoint of the handicapped worker. As soon as it became clear that a particular state had adopted a rule requiring an employer to bear the full cost of total disability for loss of the crippled worker's remaining leg or arm, employers had a strong financial incentive to discharge all handicapped workers who might bring upon them this kind of aggravated liability.
>
> Under either rule, then, the compensation system operated unsatisfactorily in the case of previously impaired workers: Under apportionment, they received far less than their actual condition required to prevent destitution; under nonapportionment they lost their jobs. Second Injury Funds, which have been adopted in all but four states, are the solution to this dilemma. The usual provision makes the employer ultimately liable only for the amount of disability attributable to the particular injury occurring in his employment, which the Fund pays the difference between that amount and the total amount to which the employee is entitled for the combined effects of his prior and present injury. Larson's Workman's Compensation Law, Vol. 2, Section 59.31 PP. 10-285 to 10-288. (Emphasis added)

CONCLUSION

This Appeal is somewhat unique in that the applicant and his employer and the employer's insurance company are not adverse parties for the purposes of this Appeal. All should be in agreement that the apportionment of Section 35-1-69, supra, is clearly the way these and similar matters are to be handled. The adverse party is the Special Fund as administered by the Industrial Commission.

In summary, Section 35-1-69, supra, and the Ortega case, supra, leave but one conclusion as to the liability of the employer for the injuries suffered by the applicant herein. The employer should be responsible only for the percentage of the industrial injury loss of bodily function bears to the total loss of bodily function percentage from all causes or 8.5% to 25% or 34% of the compensation benefits for medical and hospital bills and for the temporary total disability period.

It is therefore respectfully submitted that this case be reversed and remanded to the Industrial Commission with proper instructions that the employer and its insurance carrier be reimbursed 66% of the monies advanced to the applicant for medical and hospital compensation benefits and temporary total compensation benefits.

RESPECTFULLY SUMBITTED this 1 day of August, 1979.

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing brief to the following, postage pre-paid, this 1 day of August, 1979:

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